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Nos. 82-1860 and 82-1862

In The

Supreme Court of the United States

October Term, 1983

SCHNEIDER MOVING & STORAGE COMPANY,
Petitioner,

and

PROSSER'S MOVING AND STORAGE COMPANY,
Petitioner,

vs.

LORAN W. ROBBINS, et al., Trustees of the Central States, Southeast and Southwest Areas Pension Fund, a pension trust,
Respondents.

and

LORAN W. ROBBINS, et al., Trustees of the Central States, Southeast and Southwest Areas Welfare Fund, a health and welfare trust,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER SCHNEIDER MOVING AND STORAGE COMPANY

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February 14, 1984

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TABLE OF CONTENTS

	Pages
Argument	1
I. Determining the scope of Schneider's funding obligation is a function of the statutory collective bargaining process	2
II. Efficiencies of size are irrelevant	6
III. The intent of Schneider and the Union was not to submit these disputes to federal courts; the intent of the grantors of the trust is irrelevant to the resolution of the coverage issues	7
IV. Judicial efficiency and economy will best be served by requiring resolution of coverage issues through the agreed upon procedure	8
V. Deferring coverage issues to arbitration will help avoid inconsistent results	11
Conclusion	13
Appendix	App. 1

Table I.....Following Conclusion and Preceding Appendix

TABLE OF AUTHORITIES

Pages

CASES:

Arnold Co. v. Carpenters, 417 U.S. 12 (1974) 10

Central States, Southeast and Southwest Areas Pension Fund, et al. v. Rainbow Glass Co., Cause No. 83-1748-C (C), pending in the United States District of Missouri, Eastern Division 11, 12

Kaiser Steel Corp. v. Mullins, 455 U.S. 72 (1982) 5

Olin Corp., 268 NLRB No. 86, 115 LRRM 1056 (January 19, 1984) 10

Spielberg Mfg. Co., 112 NLRB 1080 (1955) 10

United Mineworkers of America Health and Retirement Funds v. Robinson, 455 U.S. 562 (1982) 3

United Technologies Corp., 268 NLRB No. 83, 115 LRRM 1049 (January 19, 1984) 10

STATUTES:

Labor-Management Relations Act:

Act of July 5, 1935, 49 Stat. 452, as amended by Act of June 23, 1947, 61 Stat. 140, as amended, Section 7, *et seq.*, 29 U.S.C. § 157, *et seq.* 2

Act of June 23, 1947, 61 Stat. 157, as amended, Section 302(c)(5), 29 U.S.C. § 186(c)(5) 2, 8

Employee Retirement Income Security Act of 1974:

Act of September 2, 1974, 88 Stat. 877, as amended by Act of September 26, 1980, 94 Stat. 1296, Section 404(a), 29 U.S.C. § 1104(a) 2, 8

Act of September 2, 1974, 88 Stat. 877, as amended by Act of September 26, 1980, 94 Stat. 1295, Section 515(a), 29 U.S.C. § 1145 ..... 2, 8

TABLE OF AUTHORITIES—Continued

Pages

OTHER AUTHORITIES:

Chief Justice Burger, 1983 Year-End Report on the Judiciary 9

Daniel F. McGinn, Actuarial Primer for Trustees (3d printing 1981) (Published by International Foundation of Employee Benefit Plans, Inc.) 6

Noel Arnold Levin, Guidelines for Fiduciaries of Taft-Hartley Trusts: An ERISA Manual (3d edition 1979) (Published by International Foundation of Employee Benefit Plans, Inc.) 6

Claude L. Kordus, Trustees Handbook: A Basic Text of Labor-Management Employee Benefit Plans (3d edition 1979) (Published by International Foundation of Employee Benefit Plans, Inc.) 6

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER SCHNEIDER MOVING AND STORAGE COMPANY

ARGUMENT

The Brief of the Respondent Trustees emphasizes the conflict which their position causes between the two important national policies which are involved in these cases. It creates a tension which is unintended by Congress and this Court and which will compound the prob-

lems which the statutory and body of federal common labor law as shaped by the courts were designed to resolve.

I. Determining the scope of Schneider's funding obligation is a function of the statutory collective bargaining process.

The Court below and the Trustees have confused the collective bargaining process provided for by Section 7 *et seq.* of the Labor Management Relations Act, 29 U.S.C. § 157 *et seq.* (1976), with the administration of Taft-Hartley Act multiemployer employee benefit funds under Section 302(c)(5) of the Labor Management Relations Act, 29 U.S.C. 186(c)(5) (1976), and Sections 404(a) and 515 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1104(a) and 1145. These statutes involve separate and yet interrelated pieces of what should be a harmonious national labor and pension policy. The distinction is visually presented in the following Table I.

As Table I demonstrates, the focus of this particular dispute—determining the scope of Schneider's funding obligation—rests in the collective bargaining process and not with the administration of the respective funds.

To involve the Trustees in determining this issue would be to enmesh them in the collective bargaining process. This is precisely what Sections 302(c)(5) of the LRMA and Sections 404(a) and 515 of ERISA seek to avoid. Purely and simply, this case involves a dispute regarding the interpretation of the contract between Schneider and the union. They had agreed that such a dispute would be resolved through the process agreed upon in their collective bargaining agreement.

The Trustees and the Court below have also confused the distinction between determining Schneider's funding obligation under the terms of the collective bargaining agreement with the determination of entitlement to benefits under the plan documents. These are two separate and distinct functions.[1] Schneider and the union clearly intended that Schneider's funding obligation be set forth in the collective bargaining agreement and that its funding obligation be measured by the work performed by its "regular employees." Further, Schneider and the union clearly intended—or at least presumed—that the question of eligibility for benefits would be determined by the Trustees of the respective funds. The basis upon which the trustees make their determination of benefits and eligibility therefor is completely within their discretion, subject of course to acting prudently and reasonably. For example, there is nothing that would prevent the Trustees from making all casual and extra employees who have been employed in the moving industry for a given length of time, e.g., five years or more, eligible for certain types of benefits even though contributions have not been required on account of their work. Schneider concedes this. It just so happens that here the Trustees

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[1]As the Court recognized in *United Mineworkers of America Health and Retirement Funds v. Robinson*, 455 U.S. 562 (1982), while the level of benefits and eligibility therefor are normally determined by the trustees of multiemployer plans, employers and unions can set the level of benefits and the eligibility therefor in their collective bargaining agreement and the trustees are bound thereby.

have, in the plan document, conditioned benefits on what the collective bargaining agreement requires.[2]

The Trustees express fear that the persons whose employment has been excluded from Schneider's funding obligation will make demands for pension and/or health and welfare benefits and that the Trustees will be required to provide those benefits. These are separate and distinct considerations which are unrelated to the issues in this case. Article III, *PARTICIPATION AND ELIGIBILITY FOR PENSION AND OTHER BENEFITS,* Section 1(b) of the Plan Document provides:

> An Employee shall become a Participant of this Plan, as amended effective January 1, 1976, upon completing a "Year of Employment", as hereinafter. defined, which ends after December 31, 1975, in which "Year of Employment", at least twenty weeks of contributions are made or are required to be made to the Pension Fund on his behalf.
>
> . . . .[3]

While there is logic in the belief that every dollar that is contributed to a health and welfare or pension fund because of an employee's work will eventually be returned to that employee in the form of benefits, as the Court is

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[2]The Plan Document is not set forth in any of the appendices, but was attached as Exhibit 5 to the Complaint filed against Schneider. It provides in ARTICLE III, PARTICIPATION AND ELIGIBILITY FOR PENSION AND OTHER BENEFITS, Section 2:

> Covered Employment. (a) Any employment of an Employee for which contributions to the Pension Fund are made or are required to be made on his behalf shall be considered Covered Employment.

[3]Exhibit 5 attached to Complaint against Schneider not included in Joint Appendix.

fully aware, that is definitely not the way these or similar employee benefit funds were intended to operate. The benefits provided and the eligibility for those benefits are determined by the Trustees primarily on the basis of actuarial considerations of what projected income and projected costs will be. The income and assets are primarily dependent upon the contributions made by employers. The total amount of these contributions and, therefore, the fund income is based not only on the rate negotiated in the collective bargaining agreement, but also on the level of employment which serves as the measure of the funding obligation. The funding obligation may also be measured by factors other than labor performed. For example, in *Kaiser Steel Corp. v. Mullins,* 455 U.S. 72 (1982) the funding obligation was based on the number of tons of non-union coal which was purchased. The funding obligation can be based on many factors other than labor performed. It just so happens that it apparently made sense to Schneider and the union to measure the funding obligation by the labor performed by Schneider's regular employees and not by the labor performed by other types of employees, i.e., extras and casuals.

On the other hand, the Trustees determine, based on actuarial calculations, what the contributions, the accumulated assets, and the income therefrom will produce over a given period of time and then set a level of benefits and determine the eligibility requirements for those benefits. The actuaries base their predictions on numerous "actuarial assumptions." These amount to the actuaries' best guesses about investment earnings rates, death rates, participant termination rates, i.e., forfeitures of bene-

fits, disability retirement rates, early, normal, and late retirement rates, expense rates, number of hours, shifts, etc., worked, and census problems. The distinction between the negotiation of the funding obligation and the determination of the benefits and eligibility for benefits is well explained in Daniel F. McGinn, F.S.A., F.C.I.A., Actuarial Primer for Trustees (3d printing 1981) (published by International Foundation of Employee Benefit Plans, Inc.). Among other things, Mr. McGinn has served as a consultant and actuary for the Trustees involved in these cases. The court is respectfully referred to that basic text and in particular the discussion of the dependence of the Trustees on the funding obligation as negotiated in the collective bargaining agreement on pages 6 and 31-32. See also, Noel Arnold Levin, Guidelines for Fiduciaries of Taft-Hartley Trusts: An ERISA Manual (3d edition 1979) (published by International Foundation of Employee Benefit Plans, Inc.), in particular pages 121-134; Claude L. Kordus, Trustees Handbook: A Basic Text of Labor-Management Employee Benefit Plans (3d edition 1979) (published by International Foundation of Employee Benefit Plans, Inc.).

II. Efficiencies of size are irrelevant.

Both the Trustees in their brief and the amicus brief of the American Federation of Labor and Congress of Industrial Organizations argue that the funds involved are too big to be bothered by the resolution of coverage disputes under the terms of local collective bargaining agreements. This argument ignores the fact that the Trustees' own trust documents state that their right to

receive contributions from employers shall be made "as required by the applicable collective bargaining agreement between the parties." (J.A. p. 21) Further, what their argument amounts to is a contention that "bigger is better" and that there are economies of size if the Trustees can just be permitted to drag employers, regardless of their size—or lack of size—into federal court. Their argument ignores the fact that the very people who they claim they are attempting to protect are for the most part employed by small companies like Schneider and Prosser's. While the Trustees of these large funds may think nothing about filing suit in federal court, when an employer the size of Schneider is threatened with a federal suit, that single threat, by itself, can pose the very real likelihood that the owners and employees will incur substantial unexpected expenses, whether they pay the amount demanded (even though they be in disagreement) or whether they litigate the matter in federal court. Schneider did not bargain for the resolution of contract interpretation questions in federal court. It bargained for the resolution of such questions through a simple, expeditious, and inexpensive grievance and arbitration procedure.

III. The intent of Schneider and the Union was not to submit these disputes to Federal Court; the intent of the grantors of the trust is irrelevant to the resolution of the coverage issues.

Amicus AFL-CIO argues that the intent of the parties that created the funds was not to submit questions of trust administration to arbitration under a local collective bargaining agreement. That may very well be and

Schneider has no reason to contest the assertion. However, it is also totally irrelevant to the issue at hand. There is nothing in Section 302(c)(5) of the LMRA or Sections 404(a) or 515 of ERISA that requires or even permits the Trustees to impose their interpretation of the funding obligation on the local collective bargaining agreement. The intent of the parties that set up the trust funds in the first place is irrelevant to the issue of what Schneider's funding obligation is under its local collective bargaining agreement. This dispute does not involve questions of trust administration. It involves the scope of Schneider's funding obligation.

IV. Judicial efficiency and economy will best be served by requiring resolution of coverage issues through the agreed upon procedure.

Are the federal courts to become small claims courts? These cases were first filed as complaints in federal court in 1980. It is now 1984. Four years have passed since the commencement of these proceedings. A Federal District Court, a United States Court of Appeals, including a rehearing *en banc*, and now the Supreme Court of the United States have become involved in these two cases which should have been disposed of simply and expeditiously through the grievance and arbitration procedure of the collective bargaining agreements. Surely the involvement of the federal courts in relatively simple contract interpretation disputes will not serve justice. The collective bargaining agreement provides that a determination through the grievance and arbitration procedure shall be final and binding on the parties. Suffice it to say that had the coverage issue, which is now raised by the Trustees, been resolved against Schneider, Schneider would

have long ago been required to pay whatever was determined to be due. On the other hand, if the union had determined that it disagreed with the Trustees' position on the coverage issue and that it agreed with Schneider's position on the coverage issue, this matter likewise would have been resolved once and for all. Why should the Trustees be permitted to file time-consuming and expensive lawsuits in federal court when the issues they are raising have either been resolved or can be simply resolved between the union and the employer?

Chief Justice Burger in his 1983 year-end *Report on the Judiciary,* made special reference to the "Costs of Justice in America" and pointed out many of the advantages of arbitration over court litigation. While his comments related to the use of arbitration as an alternative to litigation, whereas here we are talking about utilization of the grievance and arbitration procedure as agreed upon by the union and Schneider as an alternative to the Trustees suing in federal court when coverage issues are involved, many of the arguments still apply. Arbitration is extremely swift and certain as compared to years spent as a case awaits trial in federal court. The decision under the collective bargaining agreements involved here would be final and binding. The costs of an arbitration are only a fraction of the costs involved in federal court litigation. The expertise of an arbitrator familiar with the law of the shop would be available. Strict rules of federal evidence do not apply. Such a resolution is what Schneider and the union bargained for.

Further, the National Labor Relations Board has recently reaffirmed its commitment to allowing issues which involve mixed questions of contract interpretation and

statutory rights under the Taft-Hartley Act to be resolved under contractually agreed upon grievance and arbitration procedures. *United Technologies Corporation,* 268 NLRB No. 83, 115 LRRM 1049 (Jan. 19, 1984). Further, at the same time the NLRB reaffirmed its policy announced in *Spielberg Mfg. Co.,* 112 NLRB 1080 (1955) to defer to arbitration awards as an important aspect of the national labor policy favoring private resolution of labor disputes. *Olin Corp.,* 268 NLRB No. 86, 115 LRRM 1056 (Jan. 19, 1984). While Schneider obviously does not suggest that the Court is bound by rulings of the NLRB, the following should be noted. First, the NLRB is vested with jurisdiction to administer the Labor Management Relations Act because Congress determined that a special type of expertise was necessary to formulate a national labor policy. Secondly, the NLRB adjudicates statutory rights, not private contractual rights. Nevertheless, it believes that the statutory rights are best served if their resolution is deferred to the contractual grievance and arbitration procedure. Third, the NLRB, serving as a governmental agency with special expertise in the labor relations arena, has determined that the arbitration process is an important aspect of the national labor policy favoring private resolution of labor disputes and that this policy will be served by deferring to the arbitration process whenever possible. Last, this Court has approved the NLRB policy on deferring to arbitration both before and after the arbitration award has been issued. *Arnold Co. v. Carpenters,* 417 U.S. 12 (1974), 16-17.

Requiring that the Trustees defer to a resolution of the coverage issues by the union and Schneider in accordance with the agreed upon contractual arbitration pro-

cedures is consistent with the NLRB policy. As demonstrated by the facts in the Prosser case, precisely the same issue which the Trustees are attempting to litigate in federal court was in fact the subject of an unfair labor practice before the NLRB which the NLRB deferred to the arbitration process. To hold that the Trustees may circumvent that process by litigating the coverage issue directly in federal court creates a tension which is not consistent with the national labor policies.

V. Deferring coverage issues to arbitration will help avoid inconsistent results.

The Trustees have attempted to discount the likelihood of inconsistent results occurring if the same issues are resolved through the grievance and arbitration procedure between a union and an employer and also between trustees of a fund and an employer in federal court. However, this concern is not imaginary. Schneider respectfully requests the Court to take judicial notice of the case of *Central States, Southeast and Southwest Areas Pension Fund, et al., Plaintiffs, v. Rainbow Glass Co., Defendant;* Cause No. 83-1748-C(C) now pending in the United States District Court for the Eastern District of Missouri, Eastern Division. In that case, the same Trustees as the Respondents here have filed suit against Rainbow Glass Co. alleging, among other things, that Rainbow Glass had failed to make contributions due for a particular employee. This same employee had been considered to be a "temporary employee" by the employer, and therefore contributions were not made to the Trustees under the terms of the collective bargaining agreement. The

arbitrator found that the employee had attained the status of part-time and was therefore entitled to seniority rights under the contract. Further, the union and the employer did eventually agree in writing that contributions would be made to the Trustees on account of such person's employment, *commencing from and after May 1, 1982.* Nevertheless, in their lawsuit, the Trustees have chosen to ignore both the arbitration decision and the terms of the settlement between the employer and the union with respect to this emp'oyee and to seek contributions for time worked by this employee for the four years prior to May 1, 1982. In the *Rainbow Glass* case the Trustees have argued that they were never party to the arbitration and therefore are not bound by it. The Trustees therefore assert in *Rainbow Glass* that they have a right to litigate the status of the disputed employee. On February 7, 1984, the Honorable James H. Meredith, U.S. District Judge, denied Rainbow Glass' motion for summary judgment based on the arbitrator's decision, thus creating the very real likelihood of a conflicting result.[4]

Rainbow Glass has joined the union as a third party defendant in the case. Therefore, because of the Trustees' asserted right to resolve coverage issues in federal court, both Rainbow Glass and the union are now required to relitigate precisely the same factual issues that were litigated through the contractual grievance and arbitration procedure and the federal district court will apparently be required to hear and determine issues—which while not identical, are similar to those which were resolved by the

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[4]Judge Meredith's Order and Memorandum are included in the Appendix.

arbitrator. The Trustees claim they are not bound by either the judicially reviewed and approved arbitration decision or the written agreement.

CONCLUSION

For the foregoing reasons, and for the reasons stated in its brief on the merits, Schneider respectfully submits that the decision of the court below was erroneous and should be reversed and that the order of the district court dismissing the complaint should be affirmed.

Respectfully submitted,

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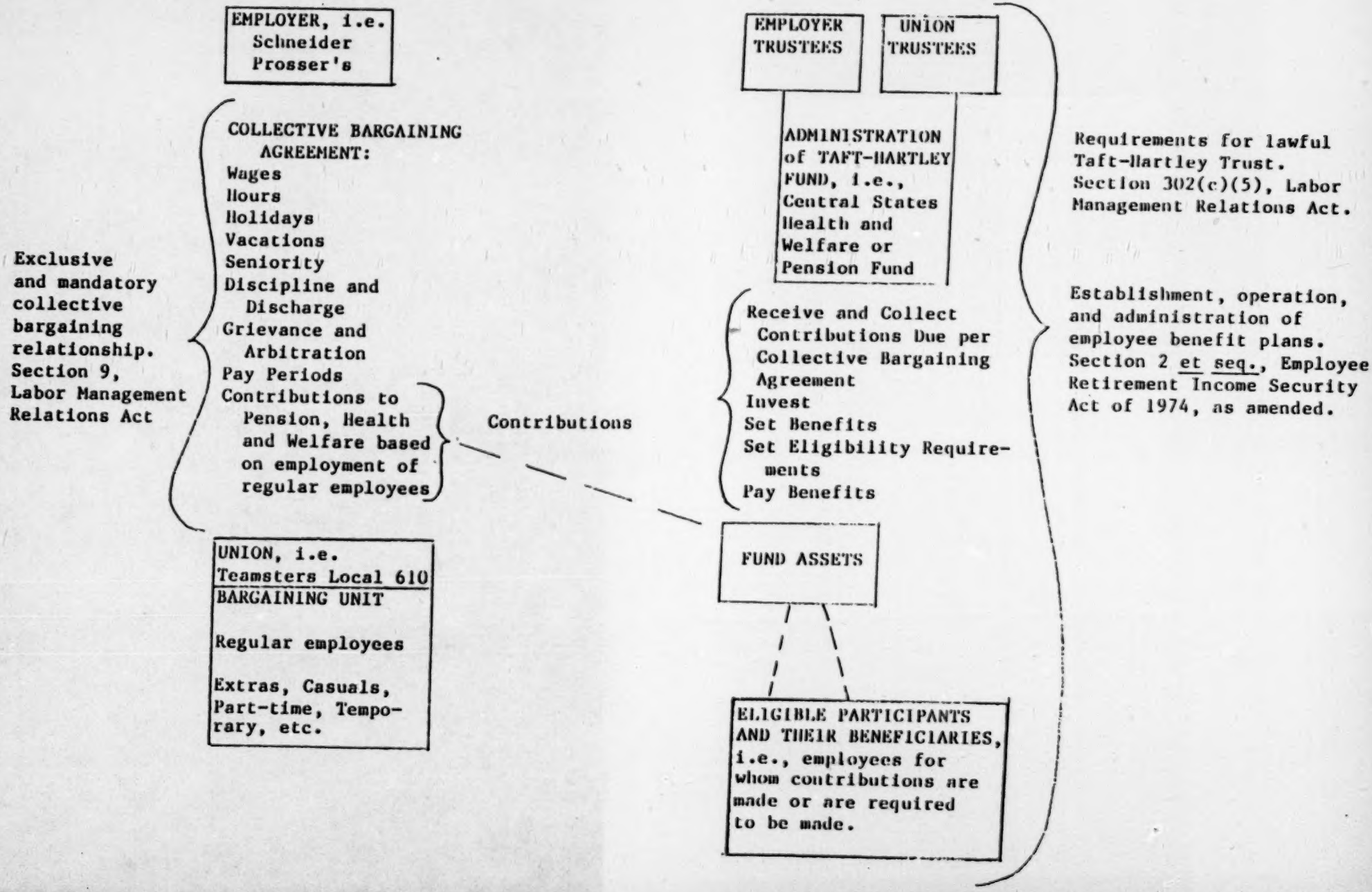
February 14, 1984

TABLE 1


EMPLOYER, i.e.
Schneider
Prosser's
COLLECTIVE BARGAINING AGREEMENT:
Wages
Hours
Holidays
Vacations
Seniority
Discipline and Discharge
Grievance and Arbitration
Pay Periods
Contributions to Pension, Health and Welfare based on employment of regular employees
Exclusive and mandatory collective bargaining relationship. Section 9, Labor Management Relations Act
UNION, i.e.
Teamsters Local 610
BARGAINING UNIT
Regular employees
Extras, Casuals, Part-time, Temporary, etc.
Contributions
EMPLOYER TRUSTEES
UNION TRUSTEES
ADMINISTRATION of TAFT-HARTLEY FUND, i.e., Central States Health and Welfare or Pension Fund
Receive and Collect Contributions Due per Collective Bargaining Agreement
Invest
Set Benefits
Set Eligibility Requirements
Pay Benefits
FUND ASSETS
ELIGIBLE PARTICIPANTS AND THEIR BENEFICIARIES, i.e., employees for whom contributions are made or are required to be made.
Requirements for lawful Taft-Hartley Trust. Section 302(c)(5), Labor Management Relations Act.
Establishment, operation, and administration of employee benefit plans. Section 2 et seq., Employee Retirement Income Security Act of 1974, as amended.

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 83-1748-C(C)

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, et al.,

Plaintiffs,

vs.

RAINBOWGLASS CO.,

Defendant.

ORDER

(Filed February 7, 1984)

A memorandum dated this date is hereby incorporated into and made a part of this order.

IT IS HEREBY ORDERED that defendant's motion for judgment on the pleadings or, in the alternative, motion for summary judgment be and is hereby denied.

DATED this 7th day of February 1984.

/s/ J. H. Meredith
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 83-1748-C(C)

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, et al.,

Plaintiffs,

vs.

RAINBOW GLASS CO.,

Defendant.

MEMORANDUM

(Filed February 7, 1984)

This matter is pending on defendant's motion for judgment on the pleadings or, in the alternative, motion for summary judgment for the reason the plaintiffs are collaterally estopped from recovering from defendant any fringe benefit contributions for Edward Copeland since it has already been judicially determined that Copeland was a "temporary employee." The motion will be denied for the reasons stated below.

On 22 July 1983, plaintiffs filed their complaint seeking unpaid contributions and interest due and owing the plaintiffs' Pension, and Health and Welfare Funds. Plaintiffs claim that the deliquency is due to defendant's failure to remit contributions to each fund on behalf of an employee of the defendant, Copeland. The dispute in this case is whether Copeland was a regular employee beginning in August 1978, obligating the defendant to remit contributions pursuant to the pertinent collective bargaining agreement between the defendant company and the local union, with plaintiffs as third party beneficiaries.

On 27 June 1980, an arbitration opinion and award was rendered with respect to a matter of private arbitration between Rainbow Glass Co. and Teamsters Local Union No. 610 regarding an alleged violation of section 7 of article VIII of the collective bargaining agreement pertaining to seniority. The arbitrator determined that the grievant, Copeland, was entitled to seniority status from 12 November 1979. The courts in *Rainbow Glass Company v. Local Union No. 610,* 505 F.Supp. 81 (E.D.Mo. 1980) and *Rainbow Glass Company v. Local Union No. 610,* 663 F.2d 814 (8th Cir. 1981), upheld the decision of the arbitrator. Plaintiffs did not participate in the arbitration award or the subsequent appeal.

Defendant's contention that, pursuant to the doctrine of collateral estoppel, plaintiffs' cause of action in this proceeding is barred by the arbitrator's findings is in error. The doctrine of collateral estoppel is not applicable in this action. Collateral estoppel means simply that when an issue of ultimate fact has once been determined by a valid judgment, that issue cannot be again litigated between the same parties in future litigation. *City of Saint Joseph v. Johnson,* 539 S.W.2d 784, 785 (Mo. App. 1976); *Ashe v. Swenson,* 397 U.S. 436, 442 (1970). In order to invoke collateral estoppel, there must be identity or privity of parties, mutuality, and a different claim, cause or demand in the second action. Moreover, some matter litigated in the former suit must be determinative of a matter in controversy in the second suit. *North Central Truck Lines, Inc. v. United States of America,* 381 F. Supp. 1217, 1220, (W.D.Mo. 1974).

In *Rainbow Glass,* the Court of Appeals found that the status of grievant's employment changed from a part-

time employee to a full-time employee, which entitled grievant to be placed on the seniority list. 663 F.2d at 818. The court did not decide whether Edward Copeland was a regular employee for purposes of defendant's obligation to contribute on his behalf to plaintiff's Pension, and Health and Welfare Funds. While recognizing that Copeland had been treated as a "temporary employee" for fringe benefit rights in the past, the court specifically noted the arbitrator's statement that "the fact that no fringe benefit contributions were made on behalf of grievant is immaterial. . . . The obligation to make such contributions was determined by different provisions of the collective bargaining agreement than the provisions giving rise to seniority rights." 663 F.2d at 816 n. 6. It is quite evident that the court in *Rainbow Glass* did not focus on the Pension, and Health and Welfare sections of the pertinent collective bargaining agreements in making their determination, but rather limited their attention to that of the employee's seniority rights and section 7 of article VIII of the collective bargaining agreement.

In the present action, the issue of ultimate fact to be decided is whether Mr. Copeland was, in fact, a regular, full-time employee for purposes of the articles of the collective bargaining agreement pertaining to health and welfare benefits and to pension benefits, not whether he was entitled to seniority status under a different article of the agreement. The precise issue must be litigated by the real parties in interest, plaintiffs (the pension trust, and the health and welfare trust) and Rainbow Glass. Plaintiffs will be afforded the opportunity to discover and

produce evidence with respect to this issue of fact. This issue was never properly determined or litigated in the arbitration matter dealing with Copeland's seniority status. Although the *Rainbow Glass* court mentions that the company was satisfied that Copeland was a temporary employee for purposes of fringe benefit contributions, the precise issue was never decided by a disposition on the merits.

Further, plaintiffs were not involved in any way in the former arbitration hearing. The arbitration matter was the result of a grievance filed by Copeland in order to determine his seniority status. Plaintiffs are seeking contributions under an entirely separate section of the collective bargaining agreement dealing with contributions to the Pension, and Health and Welfare Funds. There was no reason for the plaintiffs to intercede in the arbitration matter. Collateral estoppel dictates that to be bound by the court's judgment in a prior suit, a non-party must have sufficient interest in the suit (found when a party possesses a legal right, interest, or duty dependent wholly or in part on the cause of action before the court) and have participated in the litigation or been a privy of the prior party who did participate. *See Montana v. United States of America*, 440 U.S. 147, 153-54 (1979). Plaintiffs executed no control in the arbritration matter and had insufficient interest in the suit. Local Union No. 610 and plaintiffs are separate and distinct entities seeking to protect separate and distinct interests.

The doctrine of collateral estoppel is not applicable in this litigation due to the absence of two important elements: (1) identical parties in the prior litigation, or

parties in privity, and (2) an ultimate issue of fact in the prior judgment that is determinative of the ultimate issue in the present litigation.

DATED this 7th day of February 1984.

/s/ J. H. Meredith
United States District Judge